



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FCP/145184

PRELIMINARY RECITALS

Pursuant to a petition filed November 13, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a hearing was held on January 29, 2013, at Kenosha, Wisconsin.

The issue for determination is whether Community Care, Inc. (Community Care) correctly terminated Petitioner's Aqua Therapy, effective November 24, 2012.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Penelope Gall
6737 W Washington St Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Christina Gabon, Program Director
Karen Buono, Program Manager
Susan Stengert, RN Care Manager
Amy Baumle, Rehab Therapy Consultant

Community Care, Inc.

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. Petitioner suffered from a traumatic brain injury after being struck by a car, which left him with severe rigidity and contracture of his muscles. Petitioner does not speak, uses a wheel chair and is completely dependent upon others for his activities of daily living (ADLs). (Exhibit 7)
3. Petitioner lives with his parents. His mother is his legal guardian. (Exhibit 1)
4. Petitioner has been attending physical therapy on land (land therapy) two times per week to receive Therapeutic Exercises and Neuromuscular Reeducation. (Exhibit 6)
5. Petitioner has also been receiving one hour of aqua therapy as, “an adjunct” to his land-based therapy. Two hours of caregiver hours are approved for accompanying Petitioner to his therapy. (Exhibit 4; Exhibit 6, pg. 35)
6. Petitioner receives informal therapy at home, in a passive range of motion (PROM) regimen administered by Petitioner’s personal care workers, 15 minutes a day, seven days a week. The PROM regimen was established about eight years ago and has not been formally updated, although Petitioner’s mother has made adjustments on her own, after watching Petitioner’s therapy sessions. (Exhibit 6)
7. On November 9, 2012, Community Care sent Petitioner a notice of adverse action indicating that it was terminating Aqua therapy and the accompanying two hours of Caregiver hours, effective November 24, 2012. (Exhibit 4)
8. On November 13, 2012, Penelope Gall filed a request for fair hearing on Petitioner’s behalf. (Exhibit 2)
9. The ultimate goal of Petitioner’s physical therapy is to maintain his current level of flexibility and range of motion. (Exhibit 6, pgs. 11-15; Exhibit 7, pgs. 33-54)
10. Petitioner’s tone and spasticity increases, which leads to decreased flexibility and range of motion, when Petitioner is unable to attend physical therapy due to illness or traveling with his parents. When Petitioner’s flexibility decreases, it is more difficult for his caretakers to dress and bathe him. (Id.; testimony of Amy Baumle)

DISCUSSION

The Family Care Program (Family Care) is a subprogram of Wisconsin’s Medical Assistance (MA) program and is intended to allow families to arrange for long-term community-based health care and support services for older or impaired family members without resort to institutionalization. *Wis. Stats. §46.286; Wis. Admin. Code §DHS 10.11; Medicaid Eligibility Handbook (MEH), §29.1.*

An individual, who meets the functional and financial requirements for Family Care, participates in Family Care by enrolling with a Care Management Organization (CMO), which, in turn, works with the participant and his/her family to develop an individualized plan of care. *See Wis. Stats. §46.286(1) and Wis. Admin. Code §DHS 10.41.* The CMO, in this case Community Care, implements the plan by contracting with one or more service providers.

Wis. Admin. Code DHS 10.41(2) states that:

Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department’s contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n (c) and ss. 46.275, 46.277 and 46.278, Stats., the long-term support community options program under s. 46.27, Stats., and

specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Emphasis added

Wis. Admin Code DHS 10.44(2)(f) states that the CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee that meets all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)(2) and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes. ...

One of Petitioner's desired outcomes is to, "maintain as much flexibility in his arms and legs as possible..." (Exhibit 6, pg. 11)

The current appeal is based upon Petitioner's complaint that Community Care erroneously terminated his aqua therapy. It is Community Care's position that a more cost-effective means of meeting Petitioner's goals is to transition Petitioner from skilled physical therapy, including aqua therapy, to a more comprehensive home exercise plan. It is also Community Care's position that aqua therapy is no longer medically necessary to meet Petitioner's desired outcomes.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hansen*, 295 N.W.2d 209, 98 Wis.2d 80 (Wis. App. 1980). The court in *Hansen* stated that the policy behind this principle is to assign the burden of proof to the party seeking to change a present state of affairs. Thus, the burden of proof falls upon Community Care to prove that it had a reasonable basis upon which to terminate aqua therapy and the accompanying Caregiver hours.

Ms. Baumle testified that Community Care wanted to change the manner in which Petitioner receives therapy for a number of reasons. First, Petitioner's Interdisciplinary Team (IDT) felt that Petitioner would benefit from more daily PROM exercises in an HEP, because he becomes noticeably less flexible when he misses physical therapy due to illness or traveling. Second, the IDT felt it would be more cost effective to eliminate aqua therapy, because the benefits of aqua therapy can be duplicated using hot packs, heated towels from the dryer, an electric blanket set on low or an electric heating pad, during a daily HEP.

With regard to cost-effectiveness, using hot packs, heated towels, electric blankets and heating pads during a daily HEP might be less costly than weekly aquatic therapy sessions, but only if the alternatives proposed would satisfactorily help Petitioner meet his stated outcomes.

As stated above, Petitioner's desired outcome is to maintain as much flexibility as possible, so that it is easier for his caregivers to dress and bathe him. Petitioner's physical therapist, [REDACTED] in her Patient Medical Necessity Notes, indicated that aqua therapy is a part of Petitioner's maintenance program. Specifically, Ms. [REDACTED] stated that, "Aquatic therapy helps to provide an excellent adjunct to [Petitioner's] land based sessions. The properties of water, including buoyancy, hydrostatic pressure, and resistance each help to assist in certain ways, including allowing the patient to exercise with less stress through his joints, improve circulation through the LE's to the heart, and promote muscle balance and strengthening. The warm aquatic environment allows greater ability to stretch the patient's extremities without pain."

Community Care proposes replacing the aqua therapy with a daily, 30-minute, comprehensive HEP that includes the use of hot packs, warm towels, electric blankets or heating pads to help improve circulation and flexibility while stretching. It seems reasonable to conclude that a daily, 30 minute, comprehensive HEP that

includes the use of heat, would do just as much or more to maintain Petitioner's flexibility than aqua therapy once a week, and that it would do so more cost effectively, in the long haul. However, this would be true, only if Petitioner's caregivers, who are not trained in the field of physical therapy, can administer the program safely and effectively. Otherwise, Petitioner risks increased contractures that would require surgery to treat. (See statement of [REDACTED], Petitioner's physician – Exhibit 7)

It should be noted that Wisconsin Administrative Code states that the CMO, through its case management team, shall monitor the health and safety of the enrollee. Wis. Admin. Code §DHS 10.44(2)(d)3, *emphasis added*.

It should also be noted that there was much discussion concerning how much Medicare would cover, as opposed to Community Care/Family Care and whether Medicare covered the desired services. Because Family Care is a subprogram of Wisconsin's Medicaid program, the applicable standards of coverage are those proscribed by the Medicaid program administered by the Wisconsin Department of Health Services, not the standards of coverage proscribed by the Social Security Administration/Medicare. Wis. Adm. Code, §DHS 107.16(3)(c) provides for maintenance Physical Therapy in certain cases. Specifically, maintenance therapy is covered if one of three conditions is met:

1. The skills and training of a therapist are required to execute the entire preventive and maintenance program;
2. The specialized knowledge and judgment of a physical therapist are required to establish and monitor the therapy program, including the initial evaluation, the design of the program appropriate to the individual recipient, the instruction of nursing personnel, family, or recipient, and the necessary re-evaluations; or
3. When, due to the severity or complexity of the recipient's condition, nursing personnel cannot handle the recipient safely and effectively.

Community Care is correct that an updated home PROM regimen/HEP is needed, given the undisputed fact that Petitioner's parents and caregivers have not received any formal guidance in this area for over eight years and that it might help stave off the regression Petitioner experiences when he is unable to attend physical therapy. However, the record establishes that, at least for the time being, the specialized knowledge and judgment of a physical therapist are required to execute and monitor the maintenance therapy program.

As discussed above, it is undisputed that Petitioner needs a certain level of therapy to maintain his flexibility. One of the concerns expressed by Petitioner's parents and caregivers is knowing how far to push Petitioner, without injuring him or causing him undue pain. Because Petitioner is basically non-verbal and unable to communicate his wants and needs, he cannot tell a caregiver when they have gone too far or when he is in pain. Indeed, even Ms. Baumle, a trained therapist, conceded that Petitioner's non-verbal cues are difficult to ascertain. If this was difficult for Ms. Baumle, a trained professional, to know it is difficult to believe that a person untrained in picking up pain behaviors, or sensing muscle tension, would be able to adequately stretch Petitioner's muscles, as needed, without either being too timid or causing Petitioner undue pain.

Thus, without evidence that Petitioner's caregivers can be trained to safely and effectively administer the proposed HEP to Petitioner, Community Care's decision to terminate aqua therapy cannot be upheld.

CONCLUSIONS OF LAW

Community Care has not met its burden to prove that it terminated aqua therapy services, effective November 24, 2012.

THEREFORE, it is

ORDERED

That Community Care reinstate aqua therapy services and the accompanying Caregiver hours. This shall be subject to review at the end of Petitioner's certification period. Community Care shall take steps to do this within ten days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

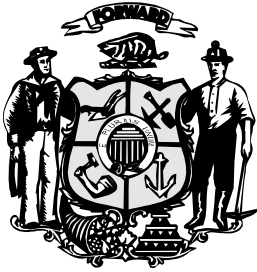
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 6th day of February, 2013.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 6, 2013.

Community Care Inc.
Office of Family Care Expansion
penelopeg@drwi.org